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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

GLEND A W.,  
Petitioner,

v.

SUPERIOR COURT OF ALAMEDA  
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Real Party in Interest.

A107272

(Alameda County  
Super. Ct. No. J186261)

**INTRODUCTION**

Petitioner Glenda W. is the mother of J.W., born in July 1993, who is a dependent child of the juvenile court. Pursuant to California Rules of Court, rule 39.1B, Glenda W. petitions for extraordinary writ review of an order terminating reunification services and setting a permanency planning and implementation hearing for J.W., pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup> Glenda W. contends that the juvenile court violated her due process rights by resting its decision “almost entirely” on a

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<sup>1</sup> The Welfare and Institutions Code provides that a petition for extraordinary relief is generally the exclusive means by which an aggrieved party may challenge an order setting a permanent planning hearing. (Welf. & Inst. Code, § 366.26, subd. (b)(1).) These petitions for extraordinary relief are governed by procedures set forth in California Rules of Court, rule 39.1B. All further statutory references are to the Welfare and Institutions Code. All further rule references are to the California Rules of Court.

psychological evaluation of Glenda W. that was not entered into evidence at the hearing at which the challenged order was issued. Having previously issued our order to show cause on August 18, 2004, we now deny the petition on the merits. (§ 366.26, subd. (l).)

### **FACTS AND PROCEDURAL HISTORY**

Glenda W. at one time was a licensed day care provider and had her own day care business. In May 2001, when J.W. was almost eight years old, Glenda W. had a stroke, and became partially physically disabled as a result. Due to her physical disabilities, Glenda W. was required to use a wheelchair, and could no longer cook meals and maintain her home. Glenda W.'s own mother, Dolly W. (grandmother), helped her with grocery shopping and cooking for a while, but the relationship between the two deteriorated, and in September 2002, Glenda W. obtained a restraining order that prevented grandmother from visiting or communicating with Glenda W. Glenda W.'s relationship with J.W. also deteriorated after her stroke.

Eventually, respondent Alameda County Social Services Agency (Agency) received a referral regarding Glenda W.'s apparent neglect of J.W., and Agency personnel interviewed J.W. at school and spoke to school staff and to Glenda W., grandmother, and J.W.'s therapist. As a result of this investigation, on December 2, 2002, J.W. was detained on an emergency basis and placed in a temporary foster home. On December 4, 2002, the Agency filed a petition under section 300, subdivision (b), alleging that due to the physical disability resulting from her stroke, Glenda W. could not adequately care for J.W.; that Glenda W. failed to provide J.W. with adequate food, so that he went to bed without dinner an average of 20 days a month; that Glenda W. had not taken advantage of in-home support services to assist her in providing herself and J.W. with basic necessities such as cleaning, transportation, shopping, and cooking; and that J.W. did not want to return home.

On December 30, 2002, after a combined jurisdictional and dispositional hearing, the juvenile court found the allegations of the petition to be true; adjudged J.W. to be a dependent of the court; and adopted the Agency's recommended disposition, which included placing J.W. in a licensed foster home and providing 12 months of reunification

services. The Agency's plan for reunification services included family therapy for Glenda W. and J.W. The court granted Glenda W. liberal visitation and, most significantly for purposes of this appeal, ordered Glenda W. to undergo a psychological evaluation.

At an initial session of the six-month review hearing, on June 11, 2003, the court continued its prior order in effect, but gave the Agency discretion to place J.W. with grandmother instead of Glenda W. J.W. was placed in his grandmother's home on June 13, 2003.

A partial psychological evaluation of Glenda W. was prepared in June 2003 (the June 2003 report), based on testing performed during February and March 2003. The June 2003 report indicated that Glenda W.'s stroke appeared to have diminished her cognitive functioning and verbal abilities, and that her neuropsychological functioning was significantly impaired, indicating a likelihood that she had suffered brain injury as a long-term effect of her stroke. The report stated that it was only "a partial report of the findings to date," and recommended further testing.

The June 2003 report was submitted to the court in connection with the second session of the six-month review hearing, which occurred on July 15, 2003. The Agency's assessment of the case as of that date, based in part on the June 2003 report, was that the stroke had impaired not only Glenda W.'s physical mobility, but also her emotional and cognitive functioning. The Agency recommended that the court find that Glenda W. had made partial progress on the reunification plan, and set a 12-month permanency planning hearing for December 2003. After the hearing, the court adopted the Agency's recommended findings and orders, and ordered Glenda W. to cooperate with the Agency caseworker and participate in the case plan.

In October 2003, Glenda W. and grandmother, along with an Agency caseworker, attended a mediation session at which they agreed to a visitation schedule for Glenda W. to spend time with J.W. In that connection, Glenda W. agreed to continue complying with all components of her case plan. The juvenile court approved the mediation agreement at the 12-month review hearing on November 25, 2003.

The Agency's report for the 12-month review hearing, dated November 25, 2003, recommended that J.W. remain with grandmother, that reunification services be terminated, and that a section 366.26 hearing be set, with a view to giving grandmother legal guardianship as J.W.'s permanent plan. The report also indicated that Glenda W. had participated in one session of a psychological evaluation with Dr. Warren Taylor, a different psychologist from those who prepared the June 2003 report, but that Glenda W. had not completed the entire additional psychological evaluation for which she had been referred. At the hearing, the court found that Glenda W. had made minimal progress toward reunification, and indicated that a permanency planning hearing would be held on February 25, 2004.<sup>2</sup> In the meantime, however, the court continued the 12-month review for a contested hearing on January 5.

At the January 5 hearing, the court denied Glenda W.'s request that J.W. be called to testify, and continued the balance of the hearing to February 2. One of the main reasons the court gave for the continuance was that Glenda W.'s psychological assessment had not yet been completed. Glenda W.'s counsel argued that Glenda W. had not yet received reasonable reunification services because she had not yet been offered "rehabilitative oriented neuropsychological therapy," and the Agency's counsel responded that these services could not be offered without Glenda W.'s cooperation in signing a release for her medical records in order to determine exactly what services were needed. The court agreed, urging Glenda W. to sign the necessary release. Glenda W. indicated that she wanted to know what she was signing, and Glenda W.'s counsel assured the court that he would recommend to Glenda W. that she sign a release allowing access to her records by medical professionals. The court expressed a desire to allow Glenda W. more time to comply with the reunification plan, particularly in light of the difficulties posed by her disability. Accordingly, the court ordered that the existing order remain in effect pending the continued hearing.

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<sup>2</sup> All further unspecified references to dates are to the year 2004.

On January 27, the Agency filed an addendum report (the January 27 addendum report) for consideration at the hearing scheduled for February 2. The January 27 addendum report stated that “The purpose of this report is to provide the Court and all parties with copies of [Glenda W.’s] completed Psychological Evaluation as assessed by Dr. Warren Taylor.” The transcript of the February 2 hearing indicates that the court received and read the January 27 addendum report, including Dr. Taylor’s report (the Taylor report), and the minutes show that the January 27 addendum report was admitted into evidence.

At the February 2 hearing, the Agency offered to extend reunification services for six more months, on condition that Glenda W. agree to the recommendations in the Taylor report, sign medical and other releases as needed for further evaluations, and resume visitations with J.W., which had not occurred since Christmas due to Glenda W.’s health problems. After some discussion of the problems with visitation, the court commended Glenda W. for completing the psychological evaluation, and indicated a concern that Glenda W. needed to comply with the recommendations of the Taylor report, including a thorough physical and neurological examination, individual psychotherapy, and parenting classes or a parent support group. Glenda W.’s counsel indicated that Glenda W. had reviewed the recommendations in the report and was willing to comply with them; that she was already receiving psychotherapy and would continue to do so; and that she was very interested in participating in family therapy and/or mediation with J.W. and grandmother.

After further discussion, the court ordered Glenda W. to participate in family therapy with grandmother and possibly J.W. as well, in order to attempt to resolve the tension between Glenda W. and grandmother, which was adversely affecting J.W. The court found, “based on the facts contained in the reports of the . . . [A]gency” (original capitalization omitted), that Glenda W. had made partial progress toward reunification, but that she had not participated regularly in court-ordered programs or services and had not made substantial progress, so that J.W. could not yet be returned to her custody. The

court extended reunification services for six months, and set the case for an 18-month review on May 11.

In its status review report for the May 11 hearing (the May 2004 report), which the court admitted into evidence in its minute order, the Agency reported that Glenda W. had completed several aspects of her case plan, but had not followed through with the recommendations in the Taylor report. Specifically, Glenda W. had refused the assistance offered to her by the Agency and a public health nurse in securing appointments for the thorough physical and neurological examination that was recommended in the Taylor report.

The May 2004 report also indicated that Glenda W. had “continued to be resistant in participating in visitation in a consistent manner and of substantial duration,” due in part to health problems (including pneumonia that the caseworker believed was exacerbated by Glenda W.’s self-neglect), and in part to her physical limitations. The tension between Glenda W. and grandmother had not been resolved, and Glenda W. had evinced a tendency to use J.W. as a conduit for her communications with grandmother, which was inappropriate. On the other hand, Glenda W. had worked well with her most recent in-home support worker, and had taken a computer class with J.W. at the public library, which both of them appeared to have enjoyed; she also was supportive of J.W.’s sports and music activities.

In the May 2004 report, the Agency recommended that the court terminate reunification services and adopt guardianship with grandmother as J.W.’s permanent plan. At the hearing on May 11, the court took no substantive action on these recommendations. Instead, the matter was set for a contested hearing on June 16.

The contested 18-month review hearing was continued from June 16 to July 14 at Glenda W.’s request, due to a relapse of her pneumonia. On July 14, the court heard the testimony of Glenda W., her in-home support services worker, and the Agency caseworker. At the conclusion of the hearing, the judge took the matter under submission until the following afternoon.

When the hearing reconvened, the trial judge prefaced her announcement of her decision by noting that she had “considered all of the evidence that was entered, as well as the reports that were submitted and the argument of counsel. And I also went back and reviewed the psychological evaluation by Dr. Taylor.” The judge added, “I know that [Glenda W.] loves [J.W.]. . . . However, I disagree that [Glenda W.] has the ability at this time to parent [J.W.].”

The judge found specifically that despite the court’s orders, Glenda W. had not complied with the recommendation in the Taylor report that she receive a complete medical evaluation and a neurological examination, and that as a result of Glenda W.’s lack of cooperation, the Agency and the court were unable to assess accurately how to give Glenda W. further assistance in parenting J.W. The judge also noted that the Taylor report “indicates that [Glenda W.] has a severe diagnosis of psychopathology” and identified “a number of symptoms and indications . . . of [Glenda W.’s] probable inability to parent [J.W.],” and that the report’s “prognosis is [that Glenda W.’s] ability to parent would be very poor.” She went on to hypothesize that “if [Glenda W.] perhaps had participated and followed through with some of the recommendations, some of the issues . . . with regard to a determination of her ability to parent [J.W.] may have been addressed. But because she did not follow through, we’ve not been able to assess her ability to parent. And I can only conclude . . . because of the lack of follow-through that I can only look at her current situation and her current ability to parent, which I don’t believe she has at this time.”

The judge acknowledged the progress that Glenda W. had made in the preceding couple of months, as testified to by her in-home support services worker, but concluded that “it just seems to fall short and seems to be insufficient in terms of her overall ability to parent a [child of J.W.’s age] day in and day out.” She noted that throughout both the Taylor report and the Agency’s reports, “it appears that [Glenda W.’s] endurance or ability to perform just normal activities throughout the day are in question,” and that Glenda W. had shown just such endurance limitations in court during the previous day’s

court proceedings. Thus, she concluded that Glenda W.'s energy level was very low, and was not sufficient, even with assistance, to parent J.W.

In addition, the court noted Glenda W.'s failure to take timely steps to obtain a diagnosis and treatment of her pneumonia, and the fact that this had adversely affected her ability to visit with J.W. Finally, she indicated that she had considered Glenda W.'s inability to follow through with family therapy, despite J.W.'s request, and Glenda W.'s "vitriolic" relationship with grandmother.

Based on these considerations, the court approved the Agency's recommendation to terminate reunification services, appointed grandmother to act as J.W.'s educational surrogate, and set a section 366.26 hearing for November 10 to adopt a permanent plan of legal guardianship for J.W. Glenda W. timely filed a writ petition under rule 39.1B seeking review of the court's order.

### **DISCUSSION**

In support of her writ petition, Glenda W. contends that the trial court's decision was "based almost entirely" on the Taylor report, which should not have been considered because it was hearsay expert testimony and was neither in evidence nor judicially noticeable for the truth of the facts stated therein. She contends there was no notice that the Taylor report would be used against her, and thus that the rule allowing the use of hearsay in dependency proceedings (see generally *In re Malinda S.* (1990) 51 Cal.3d 368, 382, 385, partially modified by statute as noted in *In re Cindy L.* (1997) 17 Cal.4th 15, 22, fn. 3) did not apply. Finally, Glenda W. argues that there was "no other basis, no other evidence presented suggesting an inability [*sic*] to parent," and thus that the trial court's consideration of the Taylor report, if error, cannot be considered harmless.

We find these arguments without merit, for several reasons. First, contrary to Glenda W.'s contention, it appears from the record before us that the Taylor report was in fact entered into evidence in the case, *before* the July 14 hearing. The Agency's January 27 addendum report stated that the Taylor report was attached, and that copies were being provided to the Court and to all parties. Although the bound clerk's transcript provided to this court by the clerk of the juvenile court does not include the attachment,



the juvenile court clerk did furnish this court with copies of the Taylor report, bound separately from the clerk's transcript and marked "Confidential/Sealed Documents." Accordingly, when the January 27 addendum report was admitted into evidence, as reflected in the minutes of the February 2 hearing, the Taylor report was received in evidence along with it.<sup>3</sup>

Second, Glenda W. waived her *Malinda S.* argument by failing to object in the trial court at the time the Taylor report was admitted in evidence. At the February 2 hearing, Glenda W.'s counsel not only made no objection when the court indicated that it had received the Taylor report but, in addition, readily acquiesced in the court's directive that Glenda W. comply with the Taylor report's recommendations. Thereafter, as should be clear from our recital of the facts, Glenda W. had ample notice that her compliance with the recommendations of the Taylor report would play a key role in the trial court's ultimate resolution of the case. Concededly, Glenda W.'s counsel<sup>4</sup> did object at the July 14 hearing to the trial court's reference to the Taylor report, but that objection came too late.<sup>5</sup>

Finally, contrary to Glenda W.'s contention, it is clear from the trial court's oral findings on July 15, as summarized *ante*, that in deciding to terminate services and set a section 366.26 hearing, the court relied on numerous facts in addition to the Taylor report. There is substantial evidence in the record to support the court's conclusion that despite numerous second chances, Glenda W. had proved unable and/or unwilling to complete the steps necessary to permit J.W. to return to her home. Meanwhile, the Agency reported that J.W. had "blossomed" under the care of his grandmother, who was willing and able to become his legal guardian. In short, even if the trial court had erred in

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<sup>3</sup> Accordingly, contrary to Glenda W.'s contention, there was no need for the Agency to comply with rule 323 in order to rely on the report as evidence at the July 14 hearing.

<sup>4</sup> At the July 14 hearing, Glenda W. was represented by a different attorney than the one who appeared for her on February 2.

<sup>5</sup> At the July 14 hearing, Glenda W.'s counsel argued that evidence from the prior hearings in the case could not automatically be considered, but would have to be reintroduced. Counsel cited no authority for this proposition in the trial court, and does not reiterate it in her writ petition. Accordingly, we deem it abandoned.

considering the Taylor report, we would find the error harmless, as the court's order is amply supported by the other evidence in the record.

**DISPOSITION**

The petition for extraordinary writ is denied on the merits. Because the permanency planning hearing is presently set for November 10, our decision is final as to this court immediately. (Rule 24(b)(3).)

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.